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ABSTRACT

The need for universities and colleges to develop policies and procedures to govern the determination of rights to copyrightable materials is addressed. The following copyright considerations are examined: scope of the copyright, copyright transfer, copyright registration, rights of copyright owner, duration of copyright, infringement of copyright, compulsory licensing, and materials subject to copyrights. Since the variety and number of copyrightable materials that may be created in a college or university community have increased significantly in recent years, an institution should consider the following: statement of institutional copyright policy, definition of copyrightable materials, determination of rights, determination of equities, and copyright administration. The statement of policies and procedures should define clearly the responsibilities and authority of the college or university copyright administrator. These include providing assistance, guidance in obtaining a publisher, and other related services. One mechanism for negotiation of copyright matters is to use a three-table panel consisting of the author or the author's representative, the institution's copyright officer, and a third member agreed on by the first two. If an institution adopts specific policies and procedures relative to the rights, disposition, and income distribution relating to copyrightable materials, it may be desirable to incorporate reference to these provisions in employment contracts where appropriate. (SW)

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Copyrights at Colleges and Universities

The expanding use of new and developing media in the teaching-learning processes has involved colleges and universities in a broad, complex spectrum of copyright issues. However, many institutions do not have adequate statements of copyright policies and procedures. The academic community traditionally has been most protective of the rights of authors' literary, dramatic, musical, artistic, and other intellectual works. When these works are original and presented by the author in a tangible medium of expression, they are protected by copyrights.

In addition to these traditional works, colleges and universities are increasingly concerned with the use of new media that generate or draw on a wide variety of materials that may be protected by copyright. These include films, television programs, cassettes, programmed learning materials, computer-assisted instruction, and computer programs. The generation of such materials is often a joint enterprise involving the ideas and talents of individual faculty members, the use of institutional facilities and equipment, and in many instances financial support from the institution or an outside sponsor. As both a generator and a user of these copyrightable materials, a college or university may face problems focusing on issues such as academic freedom, faculty rights, faculty accountability, release time, teaching credit, sponsor requirements, and the determination of rights to copyrightable materials. The income from royalties for some copyrightable materials can be significant.

The sponsor supporting a program that generates copyrightable material may stipulate specific conditions with respect to copyrights and royalty income. The U.S. Office of Education, in outlining its copyright policies in *Copyright Program Information,* 1971, made the following statement: "Universities particularly should establish written policies setting forth the respective rights of the university and its staff members in anticipated copyright royalties."

New curriculums and course materials are being developed continually for use with new media for communications and learning. Colleges and universities will be confronted with increasingly complex problems relating to copyrights and royalties on these materials. To protect the rights of the individual and the institution, it is important that colleges and universities develop well-conceived policies and procedures to govern the determination of rights to copyrightable materials.

Copyright Considerations

Scope of the Copyright

Statutory copyright is based on laws enacted by Congress. The U.S. Constitution gives Congress the power to enact laws relating to copyrights. Article 1, Section 8, states, "Congress shall have power...to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this power, Congress has enacted various laws relating to copyrights, the most recent being the Copyright Revision Act of 1976, P.L. 94-553, effective January 1, 1978.

Under current copyright laws, a work must be original and fixed in a tangible medium of expression to be copyrightable; it is not necessary that the work be novel, as is the case with an invention. The copyright is applied to the form of expression rather than to its subject matter. A description of

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a machine could be copyrighted as a writing, but this would only prevent others from copying the description; it would not prevent others from writing their own descriptions or from making and using the machine.

Copyright Transfer

A copyright may be assigned, transferred, limited, or licensed by a written agreement signed by the author or the owner of the copyright. Unless specified in the agreement, transfer of a manuscript or a material object does not transfer the underlying rights to the manuscript. Similarly, transfer of ownership of a copyrighted work does not convey any rights in the material object.

Copyright Registration

Copyright protection can be claimed by the author or those authorized by him or her to assert this right. Works produced by an individual employed specifically for their production are normally copyrightable by the employer as a "work made for hire" and not by the author-employee. A copyright is registered by submitting an application for registration to the Copyright Office in the Library of Congress. Registration is a prerequisite to bringing an action for copyright infringement and may be done at any time during the term of copyright, but registration is not a condition of copyright protection. Copyright registration is obtained by delivering to the Copyright Office (1) the deposit copy or copies of the work, as required by the type of copyright protection sought, (2) an application in the form prescribed, and (3) a small fee. The Copyright Office receives the application and on finding that the material is copyrightable registers the claim and issues to the applicant a certificate of registration. Copies that are deposited without an application and registration fee will satisfy only the deposit requirements for the Library of Congress. Forms for registering copyrightable material of several media may be obtained from: Register of Copyrights, U.S. Copyright Office, Washington, D.C. 20559.

The revised copyright law (Public Law 94-553, October 19, 1976) provides protection to both published and unpublished works of authors without regard to national origin, thereby preempting common law state copyright.

Rights of Copyright Owner

The right of copyright arises when the author fixes his or her original work in any tangible medium of expression. While notice is still required for published works, it is no longer a prerequisite to obtaining protection. The owner of a copyright has the right of reproduction, derivation, distribution, performance, and public display.

The 1976 act provides broad guidelines for determining whether or not the rights of a copyright owner are subject to fair use, which permits limited use and reproduction for certain purposes. The guidelines of the Congressional Conference Committee should be consulted for specific examples of minimum fair-use copying.

The owner of a copyrighted sound recording has the exclusive right to reproduce it, to prepare derivative works, and to distribute it. This exclusivity does not extend to the right to perform the work publicly; pending legislation may provide this right. The new act incorporates the 1972 law on sound recordings including the copyright symbol Ⓟ.

There is no renewal feature wherein the copyright reverts to either the author or specified beneficiaries, except for those works already in their first term prior to January 1, 1978. After that date, the author or heirs may terminate a transfer made other than by will after 35 years from the date of the grant by serving written notice within a five-year period thereafter. If the grant covers the right of publication, termination may be effected 35 years from the date of publication or 40 years from the date of the grant, whichever is shorter. Such termination may be effected notwithstanding any agreement to the contrary; the copyright is divisible and each separate right has the right of termination. If not so terminated, the grant of copyright continues in effect for the term of the copyright.

Works made for hire and derivative works have no termination rights. Derivative works may continue to be used but no new derivative work may be prepared after termination.

Sole or Joint Copyright Ownership. Copyright ownership may be sole or joint; the intention of the authors determines this. Unless the intention is to create a unitary whole into which two or more

authors merge their contributions, the works of more than one author form a collective work. If there is no express written agreement, the owner of a copyright in a collective work has rights limited to the material contributed by the author of such work and the privilege of reproducing and distributing the contribution of other authors as part of the particular collective work or revision of that work. In the case of a "work for hire," which is defined as a work prepared by an employee within the scope of his or her employment or a commissioned work, the employer is the original author or owner unless the parties have agreed otherwise in a written statement.

Duration of Copyright

The duration of copyright is as follows: Works created on or after January 1, 1978, exist from *creation* and have a duration of life of the author plus 50 years. If there are joint authors, then duration is for life of the last surviving author plus 50 years. In the case of anonymous works or works made for hire, the term is 75 years from the year of first publication, or 100 years from creation, whichever is shorter.

In the case of works already under statutory protection, the term is 28 years plus 47 years, for a total of 75 years. Works in their first copyright term must be renewed in the 28th year. However, if the copyright was renewed between December 31, 1976 and December 31, 1977, the term is automatically extended for a total term of 75 years.

Works created prior to January 1, 1978, but not previously published or copyrighted have been accorded protection under the Copyright Act unless they are already in the public domain. A minimum duration of copyright is 25 years even though the same criteria (the life of the author plus 50 years, etc.) apply.

Although a published copyrighted work still requires notice, the placement of the notice has been liberalized so that the manner and location will be considered appropriate if they are within reasonable view. In addition, omission of the copyright notice or error in or omission of name or date may be corrected within certain time limits.

Infringement of Copyright

Only the legal or beneficial owner of the copyright has the right to institute an action for infringement. (Recordation of transfer is a prerequisite to bringing an infringement suit.) Remedies available include injunctions against further use; impoundment or destruction of material, damages and profits; and imposition of statutory damages in lieu of actual damages and profits. In the case of a civil suit for recovery of damages for willful infringement, damages of up to $50,000 may be awarded. Damage for infringement may be reduced to $100 in cases where an employee of a nonprofit educational institution or library is involved and where there is no reason to believe there would be copyright infringement. Where the offense of criminal infringement or private gain is proven, fines up to $50,000 and imprisonment for not more than two years for subsequent offenses may be imposed by the court. Fraudulent copies together with all usable plates, etc. are seized by and forfeited to the United States.

Compulsory Licensing

Chapter 8 of the new act creates the independent Copyright Royalty Tribunal, which is responsible for determining a fair and reasonable royalty where compulsory licensing is required. Such areas are noncommercial transmissions of published musical and graphic works by public broadcasters, performances of copyrighted music by jukeboxes, and transmissions of cable television.

Materials Subject To Copyright

The following types of material, published or unpublished, may be subject to copyright:

1. Any written works, including books, journal articles, text, glossaries, bibliographies, study guides, laboratory manuals, syllabuses, tests, proposals.
2. Lectures, musical or dramatic compositions, and unpublished scripts.
3. Films, filmstrips, charts, transparencies, and other visual aids.
4. Video and audio tapes and cassettes.

5. Live video or audio broadcasts.
6. Programmed instruction materials.
7. Computer programs.
8. Pantomimes and choreographic works.
9. Pictorial, graphic, and sculptural works.
10. Sound recordings.
11. Other materials.

Although copyright law does not specifically mention computer programs, the U.S. Copyright Office has recognized since 1964 that computer programs are copyrightable, and numerous programs have been copyrighted. The National Commission on New Technological Use of Copyrighted Works recommended in 1978 that such recognition be continued.

Copyright Policy and Procedures

Colleges and universities recognize and encourage the publication of scholarly works as an inherent part of the educational mission. They also acknowledge the privilege of college or university personnel (faculty, staff, and students) to prepare, through individual initiative, articles, pamphlets, and books that are copyrighted and that may generate royalty income for the author. The variety and number of copyrightable materials that may be created in a college or university community have increased significantly in recent years as have the author-institution-sponsor relationships under which such materials are produced. Many institutions have well-defined patent policies and procedures, but few have adequate formal policies governing copyrights.

In setting copyright policy and procedures, an institution should consider the following:

1. Statement of institutional copyright policy.
2. Definition of copyrightable materials.
3. Determination of rights.
4. Determination of equities.
5. Copyright administration.

Most colleges and universities will find that copyrightable materials pose different policy and procedure problems than inventions do, so that separate policies and procedures should normally be adopted for copyrights and for patents. Policies and procedures developed for copyrightable materials should be consistent with or complementary to established institutional practices concerning inventions. Care should be taken to coordinate the copyright and publication requirements and patent requirements that may have been previously issued by the sponsoring agencies.

Statement of Institutional Copyright Policy

An institution seeking to clarify its position on the rights to and disposition of copyrightable material should develop a statement of copyright policy. This statement should be broad and it should be brief. Administrative procedures should be separate from the policy statement. The following topics may be included in the statement:

1. Recognition of the rights of college or university personnel (faculty, staff, and students), on their own individual initiative, to write or otherwise generate copyrightable materials to which they have the sole rights of ownership and disposition.
2. Disposition of rights to those materials generated as a result of assigned institutional duties or with support from a third-party sponsor.
3. Definition of royalty-sharing.
4. Description of the administrative body responsible for interpretation and administration of the copyright policy.

Definition of Copyrightable Materials

To guide faculty, staff, and students, an institution should define the types of copyrightable material covered by the copyright policy and interpret the provisions that apply to certain kinds of copyrightable materials. A list of types of materials is presented on page 3.

Determination of Rights

To determine the disposition of rights to copyrightable materials developed by college or university personnel, materials may be assessed within the framework of the following four categories:

Individual Effort. Rights to copyrightable material generated as a result of individual initiative, not as a specific college or university assignment and with only incidental use of the institution's facilities or resources, reside with the author.

Institution-Assisted Individual Effort. Where the college or university provides partial support of an individual effort resulting in copyrightable material by contributing significant faculty time, facilities, or institutional resources, it is reasonable to consider joint rights to ownership and disposition of these materials and a sharing of royalty income. A written agreement of joint ownership should be required. Some colleges or universities may find it desirable to merge this category with that of "Individual Effort," described above.

Institution-Supported Efforts. Ownership of copyrightable material specifically developed as a result of a written assigned college or university duty may reside with the institution, although sharing royalty income with the author may be appropriate in certain instances.

Sponsor-Supported Efforts. The grant or contract under which copyrightable materials are generated may specify provisions for the disposition of rights in these materials. These provisions should be determined at the time the agreement is negotiated. Persons who produce copyrightable materials under sponsor-supported projects should clearly understand their rights and obligations and, if so indicated, their agreement should be obtained before the institution enters into the contract or grant. Similarly, these persons should be aware of the appropriate terms and conditions before the work starts. Generally, the agreement between the sponsor and the institution will vest title to copyrightable materials in the college or university, with the sponsor retaining a royalty-free license for the sponsor's use. In other circumstances, the agreement may specify that the materials be placed in the public domain. (Such a requirement is normally undesirable from the standpoint of both the institution and the author.) Or the agreement may assign all rights to the institution, or may allow the sponsor to retain all rights. Even in exceptional situations, where the sponsor retains all rights, sharing of royalty income between the sponsor and the institution may be appropriate, particularly when the project involves institutional cost sharing. Thus, the nature and extent of the institution's ownership interest in copyrighted materials that are generated through sponsored programs are subject to policies and regulations of the sponsor.

The author, institution, and sponsor are often requested to relinquish rights to copyrighted articles submitted to scholarly and professional journals, many of which are copyrighted. Advance arrangements should be made with the publisher if the author, institution, or sponsor is to retain title or other rights to copyright of the material.

It is desirable to define in advance the disposition of rights to copyrightable materials generated through institution- or sponsor-supported efforts. The disposition of rights to materials developed through individual efforts partially assisted by an institution may prove more difficult to determine, particularly in advance.

Determination of Equities

The nature and extent of participation in income resulting from royalties or assignment of copyrighted materials can be determined by following the four categories of ownership described earlier.

Individual Effort and Institution-Assisted Individual Effort. Income derived from materials resulting from the individual initiative of college or university personnel should accrue to the author alone. However, when these individual efforts are significantly assisted by the use of institutional facilities or resources, the institution and the author may stipulate some degree of income sharing.

Institution-Supported Efforts. Where copyrighted materials are generated by a specific, assigned institutional duty, institutional policy may specify the college or university as sole recipient of the derived income. Many institutions have a royalty-sharing policy on patents, so an institution may similarly adopt a policy that provides for the crediting of part or all of the royalty from copyrightable materials to authors and academic departments. In some instances the institution may elect to grant or return copyrights to the author, even though the institution commissioned the work that generated the copyrightable materials.

Sponsor-Supported Efforts. If the development of the copyrighted materials is supported by a

sponsor, the college or university and the author must adhere to the conditions of the grant or contract. Income derived from copyrighted materials is handled in accordance with institutional policies unless special contractual or grant requirements prevail. In cases where the sponsor requires the return of part of the income derived from sales of sponsor-supported materials that are copyrighted, institutional cost sharing should be considered together with other factors in determining the distribution of such royalty income. If the institution receives all or part of the income derived from the sale of such sponsor-supported materials, this income normally would be handled in accordance with established institutional policies unless special sponsor requirements prevail.

In determining institutional policy on the disposition of royalty income, it may be desirable to consider identifying a portion of the derived income as a reserve to defray costs of future revisions or to implement the adoption of the copyrighted materials.

It is imperative that the disposition of copyrights and the royalty income aspects of institution- or sponsor-supported projects leading to copyrightable materials be examined thoroughly at the outset of the project and that a clear and mutually satisfactory written understanding be reached among the author, college or university, and sponsor.

Copyright Administration

It is beneficial for a college or university to develop well-defined and codified procedures for the governance of copyrightable materials developed by its personnel. The president of the university, or more generally some other appropriately designated authority, has the ultimate responsibility for decisions on copyright matters. It is usually advantageous to delegate responsibility and authority on copyright matters to an appropriate administrator, such as the institution's legal counsel, a vice president for research, the dean of the faculty, or another administrator. The statement of policies and procedures should define clearly the responsibilities and authority of the college or university copyright administrator. These duties may include providing assistance, guidance in obtaining a publisher, and other related services on copyright matters to the institution's personnel.

Adopted procedures should provide for the copyright administrator, the author, and other concerned parties to arrive at a mutually acceptable copyright agreement within the provisions of the institution's policy. One mechanism for negotiation of copyright matters is to use a three-member panel consisting of the author or the author's representative, the institution's copyright officer, and a third member agreed on by the first two. Alternatively, a copyright advisory committee may prove helpful in evaluating ownership, disposition, and distribution of royalty income relating to copyrightable materials. Whatever the procedure for administering copyright matters, there should be specific provisions for appeal.

College or university procedures may provide for prior review of all programs expected to generate copyrightable materials with full or significant partial support by the university or a sponsor in order that an advance determination can be made concerning rights, disposition, and income distribution. This review is normally accomplished by the intended authors, the copyright officer, and any others designated by institutional policy. A mutually acceptable advance agreement covering the determination of rights, disposition, and income distribution may be an important part of the project file for those projects producing copyrightable materials with partial or total support by the institution or by a sponsor. The advance agreement may be revised as the project progresses.

Alternatively, an institution may request an annual report from faculty and staff on all copyrightable material generated during the reporting period. Those materials developed with partial or full institutional or sponsor support should be reviewed by the copyright officer and by others designated by college or university procedures to make recommendations on the disposition of rights to copyrightable material and income participation.

If an institution adopts specific policies and procedures relative to the rights, disposition, and income distribution relating to copyrightable materials, it may be desirable to incorporate

reference to these provisions in employment contracts where appropriate.

Faculty and staff should be encouraged to participate in formulating institutional copyright policies and procedures. Faculty and staff can also be involved in the governance of copyright matters to insure that policies and procedures are equitable and workable. The nature and extent of student participation in copyright policies and procedures may vary with the institution and its policy on copyrightable material generated by students.

In designing and implementing institutional policies and procedures for copyrightable materials, care must be taken to protect the initiative and rights of individual authors. Similarly, consideration should be given to copyrightable work that is the result of a group effort. These policies and procedures should reasonably insure the requisite control and accountability by the university for resources allocated to partial or full support of university personnel engaged in producing copyrightable materials.

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